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14 October 2008

Office of Administrative Law
OAL Reference Attorney
300 Capitol Mall, Suite 1250
Sacramento, California 95814

Re: Emergency Regulation 2008-1009-02E
Secretary of State Post Election Manual Tally Requirements

Dear Sir:

I am writing in opposition to emergency regulation 2008-1009-02E currently under OAL review regarding Secretary of State Post Election Manual Tally Requirements in Close Contests. There is no emergency. The Secretary has not met her burden of showing the necessity for emergency regulations as required by Government Code section 11349.1. There is no threat to the public peace, health and safety, or general welfare as required by Government Code section 11346.1(b). There is already a post election manual audit requirement in Elections Code section 15360 to ensure the accuracy of the election results. The legislature and history has found the existing manual audit requirement to be adequate and protective of the accuracy of the ballots. There is no evidence of problems with the voting systems that have now been used without incident through two statewide elections since the Secretary's recertification, and there is no evidence of machine errors or tampering with voting systems used in California before her decertification.

A finding of emergency based only upon expediency, convenience, best interest, general public need, or speculation, is not adequate under the Government Code to demonstrate the existence of an emergency. There is also no evidence, or even speculation, to suggest that the emergency regulations proposed by the Secretary will improve the accuracy of the election. Through this proposed emergency regulation the Secretary is arguing that she has a different opinion than the legislature as to the adequacy of the statutorily required manual audit even though she has certified the voting systems for use throughout the state as safe and secure and has found no problems at any of the statewide elections that she has overseen.

The Secretary attempts to justify this emergency by saying that the voting machines that she certified for use are not reliable. If that is the case then she

should decertify the voting machines and not allow them to be used at all. Again, there has been no evidence presented that votes have not been tallied, or have been tallied incorrectly by voting systems in California. If the voting system is good enough for the vast majority of Californians to vote on without an extra manual tally, then how can she assert that the voting system is not good enough if the contest is close? How can such an unequal treatment survive an equal protection argument? The manual audit proposed by the Secretary appears more of a policy preference than an attempt to save the election. She is clearly entitled to put forth her policy preferences but should have to go through the normal rulemaking process rather than claim emergency and push her preferences forward with limited notice, debate or discussion.

The Secretary and her predecessors have a history of not adopting regulations. The SOS has not adopted regulations governing the use of voting machines, voting devices, and vote tabulating devices as required by Elections Code section 19100. The Secretary has failed to promulgate regulations governing source code escrowing as required by section 19103. Section 19200 provides that "the Secretary of State shall not approve any voting system, or part of a voting system, unless it fulfills the requirements of this code and the regulations of the Secretary of State," yet the Secretary and her predecessors have not promulgated any regulations. The Secretary has also failed to promulgate regulations required in Elections Code section 19227(a) governing any voting technology and systems used by the state or any political subdivision that provide blind and visually impaired individuals with access that is equivalent to that provided to individuals who are not blind or visually impaired, including the ability for the voter to cast and verify all selections made by both visual and nonvisual means.

The Secretary also is required in section 19205 to establish the specifications for and the regulations governing voting machines, voting devices, vote tabulating devices, and any software used for each, including the programs and procedures for vote tabulating and testing. The Secretary has failed to do this and instead has chosen to implement policy through underground regulations. The Secretary clearly has violated her statutory duty under Elections Code sections 19100, 19103, 19200 and 19205 to adopt valid regulations. I would also argue that many of the conditions imposed as a part of the recertification of voting systems will fail the test put forth by the Court of Appeal in *County of San Diego v. Debra Bowen* and in the future will also be subject to APA requirements as well as these post election manual tally requirements.

All of these statutory requirements to promulgate regulations pertaining to voting systems were in place well before Secretary Bowen filed papers to run for the office of Secretary of State. She has had nearly two years to promulgate regulations governing voting systems to reflect her policy preferences, yet waited until 26 days before the biggest election in the four year election cycle to seek to claim emergency in order to impose her policy preferences without going through

the normal rulemaking process. The effect of waiting until this late date to post these emergency regulations when county election officials are buried with ballots, voter registrations and pollworker training is that they will not be able to share their expertise on the issue in order to make a better and workable policy. Had the Secretary posted these regulations even three weeks ago I am confident you would have heard from many election officials to make the regulations more workable and simpler to administer and understand.

The Secretary states that these regulations are necessary for public confidence, but I would argue that the public needs to have confidence that its elected officials are following the rule of law and not trying to get around the rules with a history of underground regulations, failure to follow the statutory requirements listed above, and then coming in at the last minute with emergency regulations which allow for only three working days of public comment when there is no emergency. There is no emergency and I urge you to require the Secretary to go through the normal APA process so that the merits of the proposed regulations can be fully discussed.

Respectfully,

/s/ Stephen N. Trout

Stephen N. Trout

Cc Pam Giarrizzo
Secretary of State Chief Counsel